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VICTIM OR THE CRIME?: THE GOVERNMENT'S BURDEN IN PROVING PREDISPOSITION IN FEDERAL ENTRAPMENT CASES

INTRODUCTION

There is no real question as to the necessity of undercover operations in combating crime, and government officials may furnish "opportunities or facilities for the commission of the offense."² Courts have long recognized that "[a]rtifice and stratagem may be employed to catch those engaged in criminal enterprises."³ It is, however, problematic "when the criminal design originates with the officials of the Government, and they implant in the mind of an innocent person the disposition to commit the alleged offense and induce its commission in order that they may prosecute."⁴ It is in these instances when the defense of entrapment ought to succeed.

The entrapment defense should protect an otherwise law-abiding citizen from government officials that attempt to prey upon his needs and weaknesses in order to persuade him to commit a crime.⁵ The courts make the defense available because without such a defense, the government would not be restricted from creating crime and corrupting the otherwise innocent.⁶ Essentially, the defense preserves the integrity of the judiciary by refusing to "permit [its] process to be used in aid of a scheme for the actual creation of a crime by those whose duty is to deter its commission."⁷

1. GRATEFUL DEAD, *Victim or the Crime, on IN THE DARK* (Arista Records 1987).

2. *Sorrells v. United States*, 287 U.S. 435, 441 (1932).

3. *Id.* (citing *Price v. United States*, 165 U.S. 311, 315 (1897); *Andrews v. United States*, 162 U.S. 420, 423 (1896); *Rosen v. United States*, 161 U.S. 29, 42 (1896); *Goode v. United States*, 159 U.S. 663, 669 (1895); *Grimm v. United States*, 156 U.S. 604, 610 (1895); *United States v. Reisenweber*, 288 F. 520, 526 (2d Cir. 1923); *Bates v. United States*, 10 F. 92, 94 (N.D. Ill. 1881)).

4. *Sorrells*, 287 U.S. at 442.

5. See *Jacobson v. United States*, 503 U.S. 540, 553-54 (1992) ("When the Government's quest for convictions leads to the apprehension of an otherwise law-abiding citizen who, if left to his own devices, likely would have never run afoul of the law, the courts should intervene."); *Harrison v. State*, 442 A.2d 1377, 1387 (Del. 1982) (stating that the entrapment defense protects against "tricky policemen trying to prey upon the needs and weaknesses of people and to persuade innocent citizens to commit crimes").

6. Stephen A. Miller, Comment, *The Case for Preserving the Outrageous Government Conduct Defense*, 91 Nw. U. L. REV. 305, 308-09 (1996).

7. *Sorrells*, 287 U.S. at 454.

Almost every American jurisdiction recognizes some variation of the entrapment defense.⁸ At the federal level, it remains a common law defense; federal statutes make no mention of it.⁹ The Supreme Court has stated that the concept of entrapment is rooted in congressional intent. It is not a judiciary "veto over law enforcement practices," as it stems from the concept that "Congress could not have intended criminal punishment for a defendant who has committed all the elements of a proscribed offense, but was induced to commit them by the Government."¹⁰

Entrapment is typically defined as "[t]he act of officers or agents of the government in inducing a person to commit a crime not contemplated by him, for the purpose of instituting a criminal prosecution against him."¹¹ It is only available as a defense when a government agent in some way induces the defendant to commit a crime.¹² Even if governmental inducement is present, however, the entrapment defense will not succeed if the defendant was predisposed to engage in the criminal activity.¹³ A defendant always has the burden of production for the defense of entrapment, meaning that he must show that a government agent induced or encouraged the criminal conduct.¹⁴ If a defendant also proffers evidence that he was not predisposed to commit the crime, "the prosecution must prove beyond a reasonable doubt that the defendant was disposed to commit the criminal act prior to first being approached by Government agents."¹⁵ Thus, the likelihood of successfully asserting the entrapment defense rested upon whether the individual defendant was predisposed to commit the crime. Simply stated, if the defendant was predisposed, then the government's inducement was not the reason for the defendant's criminal activity; therefore, he should be held accountable for his criminal activity.

Federal courts have been unable to agree on the critical element of the defense: How should predisposition be determined?¹⁶ This Com-

8. 2 PAUL ROBINSON, *CRIMINAL LAW DEFENSES* § 209, at 509 (1984).

9. The states have been free to form their own notions of the entrapment defense as they have established their own parameters and application of the defense in state statutes. *Id.* § 1.12, at 38.

10. *United States v. Russell*, 411 U.S. 423, 435 (1973).

11. *BLACK'S LAW DICTIONARY* 532 (6th ed. 1990).

12. 2 ROBINSON, *supra* note 8, § 209(a), at 510.

13. *Matthews v. United States*, 485 U.S. 58, 62-63 (1988).

14. WAYNE R. LAFAYE & AUSTIN W. SCOTT, JR., *SUBSTANTIVE CRIMINAL LAW* § 5.2, at 610 (2d ed. 1986).

15. *Jacobson v. United States*, 503 U.S. 540, 549 (1992).

16. See, e.g., *A National Survey of Current Law—Summary and Analysis*, 65 U.S.L.W. 1173 (1997); Martha Middleton, *7th Circuit Departs on Entrapment*, NAT'L L.J., Nov. 15, 1993, at 9;

ment will focus on the varying approaches the federal courts have taken to determine predisposition and whether they succeed in protecting the otherwise innocent person from those government officials that will prey upon his needs and weaknesses in order to persuade him to commit a crime. Part I begins by examining the evolution and history of the entrapment defense from its origin in federal case law.¹⁷ The Supreme Court's most recent decision on the matter in *Jacobson v. United States*¹⁸ is reviewed in detail. This provides a proper framework for identifying and analyzing the recent split between the federal circuit courts with respect to the predisposition requirement. This Comment then examines the decision of the Ninth Circuit Court of Appeals in *United States v. Thickstun*¹⁹ to determine whether it erred in holding that a determination of predisposition does not require a defendant to be in a position to commit the crime without government assistance.²⁰ Part II of this Comment urges the Supreme Court to adopt a two-tier test for evaluating a defendant's predisposition to commit a crime when a defendant asserts the entrapment defense.²¹

The complexity and subtle nuances in the entrapment doctrine raise many interesting questions that are beyond the scope of this Comment. First, the various state applications of the defense will not be explored herein, as this Comment will focus only on the Supreme Court and the federal courts' treatment of entrapment.²² Furthermore, this Comment will not address the element of government inducement and potential due process violations.²³ Such subject matter is not germane to a discussion of the predisposition requirement. Finally, this Comment will not provide a detailed discussion about the long-standing debate²⁴ over the objective²⁵ or subjective²⁶ analysis of

Shannon P. Duffy, *Entrapment Defense is Redefined: Federal Judge Uses Definition of 1st Circuit*, LEGAL INTELLIGENCER, Aug. 19, 1996, at A.

17. See *infra* Part I.

18. 503 U.S. 540 (1992).

19. 110 F.3d 1394 (8th Cir.), cert. denied, 522 U.S. 917 (1997).

20. See *infra* Part II.

21. See *infra* Part III.

22. For such a discussion, see Erich Weyand, Comment, *Entrapment: From Sorrells to Jacobson—The Development Continues*, 20 OHIO N.U. L. REV. 293 (1993).

23. For a thorough analysis of the due process claim in entrapment cases, see Paul Marcus, *The Due Process Defense in Entrapment Cases: The Journey Back*, 27 AM. CRIM. L. REV. 457 (1990).

24. Paul Marcus, *Presenting, Back from the [Almost] Dead, The Entrapment Defense*, 47 FLA. L. REV. 205 (1995).

The debate was furious over an extended period of time. See, for instance, the exchanges between Chief Justice Hughes and Justice Roberts in *Sorrells v. United States*, 287 U.S. 435 (1932); Chief Justice Warren and Justice Frankfurter in *Sherman*, 356 at

entrapment.²⁷ Although a debate over these two tests has provided discussion for many years, the majority of the United States Supreme Court has always held that the predisposition of the defendant is relevant when he raises the entrapment defense.²⁸ While an awareness of this debate may be important, recent case law illustrates that there is an increasing need to resolve how the courts ought to determine whether a defendant was predisposed to commit the crime.

I. BACKGROUND

A. *Historical Development of the Entrapment Defense and the Concept of Predisposition Prior to Jacobson v. United States*

The idea of entrapment has existed at least as long as the tale of Adam and Eve.²⁹ American courts, however, were slow to recognize entrapment as a valid defense.³⁰ While a few early federal cases considered the defense of entrapment,³¹ it was not until 1915 that a federal circuit court recognized entrapment as a defense to a crime.³² In *Woo Wai v. United States*,³³ the defendants were charged with conspir-

369; Justices Rehnquist and Stewart in *United States v. Russell*, 411 U.S. 423 (1973); and Justices Rehnquist and Brennan in *Hampton*, 425 U.S. at 484.

Id. at 214 n.83.

25. The objective test, which focuses exclusively on the conduct of the government and its agents, *Sorrells*, 287 U.S. at 450-51, has never been adopted by the Court. *Id.*

26. The subjective test, which focuses on the intent or predisposition of the defendant, has always been employed by the Court. *Id.*

27. For a discussion of these alternative approaches, see W.H. Johnson III, *Proving A Criminal Predisposition: Separating The Unwary Innocent From The Unwary Criminal*, 43 DUKE L.J. 384 (1993); Weyand, *supra* note 22, at 293.

28. *Sorrells*, 287 U.S. at 451.

[T]he defense of entrapment is not simply that the particular act was committed at the instance of government officials. That is often the case where the proper action of these officials leads to the revelation of criminal enterprises. The predisposition and criminal design of the defendant are relevant [I]f the defendant seeks acquittal by reason of entrapment he cannot complain of an appropriate and searching inquiry into his own conduct and predisposition as bearing upon that issue.

Id. (citation omitted).

29. *Genesis* 3:13. The book of Genesis tells how God commanded Adam and Even not to eat fruit from a tree in the Garden of Eden. *Id.* When Eve was confronted by God after disobeying him, she offered her very own version of the entrapment defense: "The serpent beguiled me, and I did eat." *Id.*; see Scott C. Paton, Note, "*The Government Made Me Do It*": A Proposed Approach to Entrapment Under *Jacobson v. United States*, 79 CORNELL L. REV. 995, 996 (1994) (citing *Board of Comm'rs v. Backus*, 42 U.S. (1 How.) 33, 42 (1864)).

30. PAUL MARCUS, *THE ENTRAPMENT DEFENSE* § 1.03, at 7 (1989).

31. See, e.g., *United States v. Whittier*, 28 F. Cas. 591 (E.D. Mo. 1878) (No. 16,688); *United States v. Adams*, 59 F. 674 (D. Or. 1894).

32. *Woo Wai v. United States*, 223 F. 412 (9th Cir. 1915).

33. *Id.*

ing to bring illegal Chinese immigrants into the United States from Mexico.³⁴ An agent suspected that Woo Wai possessed information regarding other unlawful importations.³⁵ He devised a plan to make Woo Wai talk by inducing him to commit the crime of bringing other Chinese immigrants into the United States.³⁶ Agents soon began urging Woo Wai to participate in a scheme to bring Chinese immigrants across the border.³⁷ After the scheme was "assiduously and persistently urged upon him," he agreed to enter into the scheme and was later charged and convicted for this crime.³⁸ Woo Wai argued that he had been "lured by government officers" into committing the crime, and therefore, he had committed no offense.³⁹ The Ninth Circuit Court of Appeals reversed Woo Wai's conviction, stating that it was "against public policy to sustain a conviction obtained" in this manner.⁴⁰ Since *Woo Wai*, the entrapment defense has often been raised in the lower federal courts.⁴¹

The United States Supreme Court first dealt with the issue of entrapment in 1928 in *Casey v. United States*.⁴² In *Casey*, the defendant was charged with supplying morphine to prison inmates.⁴³ The defendant was a lawyer who frequently visited inmates in order to provide legal consultation.⁴⁴ The jailer observed that those with whom Casey had visited were often under the influence of narcotics.⁴⁵ The

34. *Id.* at 413.

35. *Id.*

36. *Id.* "He wanted to get this man, as it were, in the door, so that the man would have to give him the information." *Id.*

37. *Id.* The agent actually hired a private detective, who approached Woo Wai and told him that he knew a way to make money. *Id.* He did not disclose any other information, but he convinced Woo Wai to go with him to San Diego, where he introduced him to local inspectors of immigration. *Id.* At this time, the detective informed Woo Wai of the plan to bring other illegal Chinese immigrants across the Mexican border. *Id.*

38. *Woo Wai*, 22 F. at 414. When the scheme was first presented to Woo Wai, he stated, "This is in violation of the law. It could not be done." *Id.* at 413. The immigration inspectors responded, "Oh, well, if we make no arrest, who can make arrest? And then we don't want to go to jail. You don't want to go to jail, and if you go to jail, we will go to jail." *Id.*

39. *Id.* at 412-13.

40. *Id.* at 415.

Id. The court stated that the general rule with regard to entrapment is "[t]he fact that a detective or other person suspected that the defendant was about to commit a crime, and prepared for his detection, as a result of which he was entrapped in its commission, is no excuse, if the defendant alone conceived the original criminal design." *Id.* at 414. The court expressed concern that in this case, "the criminal act came from the officers of the government. The whole scheme originated with them." *Id.* at 415.

41. MARCUS, *supra* note 30, § 1.03, at 13.

42. 276 U.S. 413 (1928).

43. *Id.* at 416-17.

44. *Id.* at 416.

45. *Id.* at 419.

jailer instigated a plot to trap the defendant in the act of providing narcotics.⁴⁶ The plot involved surreptitiously recording conversations in which inmates requested that he supply them with narcotics.⁴⁷ The majority dismissed the entrapment defense,⁴⁸ but Justice Brandeis paved the way for the acceptance of the entrapment defense with his strong dissent.⁴⁹ Brandeis stated:

The obstacle to the prosecution lies in the fact that the alleged crime was instigated by officers of the Government; that the act for which the Government seeks to punish the defendant is the fruit of their criminal conspiracy to induce its commission. The Government may set decoys to entrap criminals. But it may not provoke or create a crime and then punish the criminal, its creature. . . .⁵⁰

Four years later, the Supreme Court recognized the defense of entrapment in the federal system in *Sorrells v. United States*.⁵¹ In *Sorrells*, the defendant was indicted for selling and possessing whiskey in violation of the National Prohibition Act after being a target of law officials' attempts to discover individuals illegally selling alcohol.⁵² In that case, the government agents discovered that the defendant was a veteran of World War I and utilized this fact to establish a rapport with him.⁵³ An agent twice asked the defendant to get him some liquor, and on each occasion the defendant said that he did not have any.⁵⁴ Then, after conversations about war experiences with another agent from the same division in the service, the defendant agreed to provide liquor to the agent.⁵⁵ The defendant asserted the entrapment defense, but both the trial and appellate court refused to sustain the defense.⁵⁶

46. *Id.* at 422-23.

47. *Id.* The scheme was devised by two federal narcotics officers and carried out with the help of two of the inmates who were known as drug addicts. *Id.* at 422. The narcotics officers installed a dictaphone in the room where Casey was to meet with these inmates, so they could listen to the conversations. *Id.* The inmates requested that Casey get them some morphine; he agreed to do so. *Id.* It was then arranged that the morphine was to be "smuggled into the jail in laundry." *Id.* After Casey gave the package to one of the inmate's relatives, it was brought to the federal narcotics agents who tested it and found it to be morphine. *Id.* at 423.

48. *Casey*, 276 U.S. at 418-19. "We are not persuaded that the conduct of the officials was different from or worse than ordering a drink of a suspected bootlegger." *Id.* at 419.

49. *Id.* at 421-25.

50. *Id.* at 423.

51. 287 U.S. 435 (1932).

52. *Id.* at 438-41.

53. *Id.* at 439.

54. *Id.*

55. *Id.*

56. *Id.* at 438-39. The Circuit Court of Appeals concluded that "the defense of entrapment can be maintained only where, as a result of inducement, the accused is placed in the attitude of

The Supreme Court reversed, holding that the defense of entrapment was available and that the lower courts had erred in holding that as a matter of law there was no entrapment.⁵⁷ The Court looked to the lower federal courts' application of the entrapment defense⁵⁸ in reaching its conclusion that the entrapment defense arises from the interpretation of the statute that the defendant allegedly violated.⁵⁹ In this instance, the Court concluded that when Congress enacted the Prohibition Act it did not intend that "its processes of detection and enforcement should be abused by the instigation by government officials of an act on the part of persons otherwise innocent in order to lure them to its commission and to punish them."⁶⁰ The Court opined that in such instances, the defense of entrapment ought to be available.⁶¹

The Court further defined the defense by stating that it "is not simply that the particular act was committed at the instance of government officials. . . . The predisposition and criminal design of the defendant are relevant."⁶² The Court concluded that the entrapment defense proceeds on the theory that the defendant is not guilty when government officials instigate the crime. The entrapment defense, therefore, should not be viewed as analogous to a pardon in which the guilty simply goes free.⁶³ The Court did not prohibit government undercover operations in any way but held that the objective of undercover operations should be to reveal an established criminal design and to expose the criminal's illegal activity.⁶⁴ The Court concluded that "[a] different question is presented when the criminal design originates with the officials of the Government, and they implant in the mind of an innocent person the disposition to commit the alleged offense and induce its commission in order that they may prosecute."⁶⁵

The decision that the Court reached in *Sorrells* relied, for the most part, on the state of mind of the accused rather than on whether or not

having committed a crime which he did not intend to commit, or where, by reason of the consent implied in the inducement, no crime has in fact been committed." *Id.* at 442.

57. *Sorrells*, 287 U.S. at 452.

58. *Id.* at 443.

59. *Id.* at 446.

60. *Id.* at 448-50.

61. *Id.*

62. *Id.* at 451.

63. *Sorrells*, 287 U.S. at 452.

64. *Id.* at 441-42.

65. *Id.* at 442.

the government's conduct was reasonable.⁶⁶ This established that the only way the prosecution can defeat the entrapment defense is by successfully proving that the defendant "was independently predisposed" to commit the crime.⁶⁷ In determining whether Sorrells was, in fact, predisposed to commit the crime, the Court looked at whether "the act for which defendant was prosecuted was instigated by the prohibition agent," whether there was any evidence that Sorrells had sold liquor prior to this act, and whether he has a reputation as a law-abiding citizen.⁶⁸ The Court justified such an inquiry, stating that "if the defendant seeks acquittal by reason of entrapment he cannot complain of an appropriate and searching inquiry into his own conduct and predisposition as bearing upon that issue."⁶⁹ After making this inquiry, the Court concluded that Sorrells lacked an independent predisposition; therefore, the entrapment defense was properly allowed.⁷⁰ The Court ordered that the "judgment should be reversed and the cause remanded . . . with instructions to quash the indictment and discharge the defendant."⁷¹

The Supreme Court did not revisit the entrapment issue until twenty-six years later in *Sherman v. United States*.⁷² In *Sherman*, the defendant met a government informer while he was being treated by a doctor for a narcotics addiction.⁷³ After meeting on several occasions, their conversations progressed to a discussion about the difficulties in their attempts to overcome their addictions.⁷⁴ The informer then

66. *Id.* at 458-59. Justice Roberts, in a concurring opinion, disagreed with the majority's reasoning. *Id.* Instead, he suggested that the entrapment defense should focus only on the government's conduct and not on the defendant's character. *Id.* at 459. Roberts stated that:

To say that [the instigation and inducement of a crime by an official of government] is condoned and rendered innocuous by the fact that the defendant had a bad reputation or had previously transgressed is wholly to disregard the reason for refusing the processes of the court to consummate an abhorrent transaction.

Id.

67. Stephen Garbaum, Note, "The Government Made Me Do It": A Proposed Approach to Entrapment Under *Jacobson v. United States*, 79 CORNELL L. REV. 995, 999 (1994).

68. *Sorrells*, 287 U.S. at 441.

69. *Id.* at 451.

70. *Id.* at 441.

It is clear that the evidence was sufficient to warrant a finding that the act for which defendant was prosecuted was instigated by the prohibition agent, . . . that defendant had no previous disposition to commit it but was an industrious, law-abiding citizen, and that the agent lured defendant, otherwise innocent, to its commission by repeated and persistent solicitation in which he succeeded by taking advantage of the sentiment aroused by reminiscences of their experiences as companions in arms in the World War.

Id.

71. *Id.* at 459.

72. 356 U.S. 369 (1958).

73. *Id.* at 371.

74. *Id.*

asked Sherman if he knew of any good sources for narcotics and if he could supply him with a source because he was not responding to treatment for his addiction.⁷⁵ The informer had to ask the defendant a number of times before the defendant actually agreed to get the narcotics for him.⁷⁶

In concluding that the defendant was entrapped as a matter of law, the Supreme Court relied heavily on its analysis in *Sorrells*.⁷⁷ The Court indicated that the case illustrated "an evil which the defense of entrapment is designed to overcome."⁷⁸ The record supported the fact that the defendant was trying to overcome his narcotics habit at the time he was approached.⁷⁹ The Court stated that effective law enforcement does not require the Government to play on the weaknesses of an otherwise innocent defendant and deceive him into committing a crime that he would otherwise not have attempted.⁸⁰ The Court said, in what has become a famous quote, that "[t]o determine whether entrapment has been established, a line must be drawn between the trap for the unwary innocent and the trap for the unwary criminal."⁸¹

The majority concentrated upon whether the defendant was predisposed to commit the crime in order to determine whether he was indeed "innocent" or "criminal."⁸² In reaching its conclusion that Sherman lacked predisposition, the majority relied on the fact that Sherman was susceptible to the government solicitation because he was a former addict.⁸³ The Court also noted that there was no evidence that he was currently in the narcotics trade and that no narcotics were found in a search of Sherman's apartment after he was

75. *Id.*

76. *Id.*

77. *Id.* at 372-73. The Court rejected the analysis set forth in the concurring opinion which argued that the majority should reconsider the reasoning in *Sorrells* because "[i]n a matter of this kind the Court should not . . . forego re-examination to achieve clarity of thought, because confused and inadequate analysis is too apt gradually to lead to a course of decisions that diverges from the true ends to be pursued." *Id.* at 379.

78. *Sherman*, 356 U.S. at 376.

79. *Id.* at 375-76.

80. *Id.* at 376.

81. *Id.* at 372.

82. *Id.* at 375-76.

In 1942 petitioner was convicted of illegally selling narcotics; in 1946 he was convicted of illegally possessing them. However, a nine-year-old sales conviction and a five-year-old possession conviction are insufficient to prove petitioner had a readiness to sell narcotics at the time [the informer] approached him, particularly when we must assume from the record he was trying to overcome the narcotics habit at the time.

Id.

83. *Id.*

arrested.⁸⁴ The evidence revealed that the defendant was more properly characterized as "innocent" rather than "criminal"; therefore, he had a valid entrapment claim.⁸⁵

In *United States v. Russell*,⁸⁶ the Supreme Court further solidified the view that the key inquiry in entrapment claims focuses on the defendant's state of mind, not on the government's involvement. In *Russell*, an undercover agent was assigned to infiltrate what the government believed to be an ongoing operation suspected of producing methamphetamine.⁸⁷ The agent offered to supply Russell with a scarce but lawful ingredient essential to the production of methamphetamine in return for one-half of the drugs produced.⁸⁸ One of the co-defendants indicated that he had been producing the drug for over six months and gave the agent a sample from the last batch that he had made.⁸⁹ Russell later accepted the offer, and the agent provided the ingredient.⁹⁰ Russell was eventually indicted for having unlawfully manufactured and processed methamphetamine and for having unlawfully sold and delivered the drug.⁹¹ The jury found him guilty, but the court of appeals reversed, stating that there had been "an intolerable degree of governmental participation in the criminal enterprise" because of the agent's conduct in supplying the scarce ingredient essential for manufacturing the substance.⁹²

The Supreme Court held that the court of appeals had "in effect expanded the traditional notion of entrapment, which focuses on the predisposition of the defendant, to mandate dismissal of a criminal prosecution whenever the court determines that there has been 'an intolerable degree of governmental participation in the criminal enterprise.'"⁹³ The Supreme Court reaffirmed its earlier holdings in *Sorrells* and *Sherman* by stating that "[i]t is only when the Government's

84. *Sherman*, 356 U.S. at 375-76.

85. *Id.*

86. MARCUS, *supra* note 30, § 1.08, at 28 (citing *United States v. Russell*, 411 U.S. 423, 435 (1973)).

[E]ntrapment is a relatively limited defense. It is rooted, not in any authority of the Judicial Branch to dismiss prosecutions for what it feels to have been "overzealous law enforcement," but instead in the notion that Congress could not have intended criminal punishment for a defendant who has committed all the elements of a proscribed offense but was induced to commit them by the Government.

Id.

87. *Russell*, 411 U.S. at 425.

88. *Id.*

89. *Id.*

90. *Id.* at 426.

91. *Id.* at 424.

92. *Id.* at 423.

93. *Russell*, 411 U.S. at 427.

deception actually implants the criminal design in the mind of the defendant that the defense of entrapment comes into play.”⁹⁴ The Court concluded that the evidence showed that Russell was an active participant in illegal drug manufacturing both before and after the government appeared on the scene.⁹⁵ Because the evidence supported the finding that Russell was predisposed to commit the criminal acts, the Court held that his claim of entrapment must fail.⁹⁶

In *Hampton v. United States*,⁹⁷ the Supreme Court refused to stray from its holding that the entrapment defense is unavailable to a defendant who, regardless of the government’s conduct, is predisposed to commit the crime in question. In *Hampton*, the defendant was convicted of distributing heroin after selling it to government agents.⁹⁸ Hampton conceded that he was predisposed but argued that he should have been acquitted under the defense of entrapment because the drug was supplied to him by a government informant.⁹⁹ The Court again held that the defendant’s concession of predisposition rendered the entrapment defense unavailable to him.¹⁰⁰ The Court reiterated that a defendant is protected by the entrapment defense if it is the government activity that implants the disposition to commit the offense into the mind of an innocent person, thereby inducing commission of the crime.¹⁰¹ The Court stated that “[i]f the police engage in illegal activity in concert with a defendant beyond the scope of their duties the remedy lies, not in freeing the equally culpable defendant, but in prosecuting the police under the applicable provisions of state or federal law.”¹⁰² In essence, the Court expanded the importance of the state of mind inquiry by condemning the accused no matter what government misconduct occurred.

Since *Sorrells*, the Court has consistently agreed that a valid entrapment defense has two related elements: (1) government inducement of the crime; and (2) a lack of predisposition on the part of the defendant to engage in criminal activity.¹⁰³ The element of predisposition, which is the principal element in the defense of entrapment, focuses on whether a defendant was an “unwary innocent” or an “un-

94. *Id.* at 436.

95. *Id.*

96. *Id.*

97. 425 U.S. 484 (1976).

98. *Id.* at 485.

99. *Id.* at 487 n.3.

100. *Id.* at 490.

101. *Id.* (quoting *Sorrells v. United States*, 287 U.S. 435, 442 (1932)).

102. *Id.* (finding that the police had acted in concert with the defendant).

103. *Matthews v. United States*, 485 U.S. 58, 62-63 (1988).

wary criminal."¹⁰⁴ The problem is that even after the Supreme Court's reaffirmance that the key inquiry in entrapment claims focuses on the defendant's state of mind, the federal courts have been unable to concur on how predisposition ought to be determined.¹⁰⁵

B. *Proving Predisposition Prior to Jacobson*

Proof of predisposition is obtained by evaluating the defendant's state of mind. This is done by introducing a variety of evidence.¹⁰⁶ Three rules of evidence are often employed in federal entrapment cases as a means to admit or keep out evidence about the defendant's predisposition. Rules 401 and 402 admit as relevant evidence that makes the existence of a material fact more or less probable.¹⁰⁷ Rule 403 excludes evidence "if its probative value is substantially outweighed by the danger of unfair prejudice"¹⁰⁸ Predisposition may be shown by many different types of evidence, provided that the evidence comports with these rules. Evidence of prior convictions, prior criminal activity or arrests, contemporaneous criminal activity, post-offense criminal activity, and ready acceptance of the government's offer to commit the crime have all been used to prove predisposition.¹⁰⁹

Evidence of prior convictions, criminal activity, or arrests¹¹⁰ is usually admitted to prove predisposition in federal court cases.¹¹¹ For ex-

104. *Id.*

105. See *supra* note 16 and accompanying text.

106. MARCUS, *supra* note 30, §4.14, at 141.

107. FED. R. EVID. 401. "'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable"; FED. R. EVID. 402. "All relevant evidence is admissible Evidence which is not relevant is not admissible." *Id.*

108. FED. R. EVID. 403.

109. U.S. DEPT. OF JUSTICE, MICHAEL CALLAHAN, ENTRAPMENT AND THE FEDERAL COURTS 37-48 (1984).

110. This type of evidence is admissible under FED. R. EVID. 404(b) which provides:

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident

Id.

111. See, e.g., *United States v. Walther*, 867 F.2d 1334, 1343 (11th Cir. 1989) (holding that an arrest for possession of marijuana ten years prior was properly admissible to show predisposition); *United States v. Paul*, 810 F.2d 774, 776-77 (8th Cir. 1987) (holding that evidence of prior drug transactions was properly admissible to show predisposition); *United States v. Franklin*, 704 F.2d 1183, 1187-88 (10th Cir. 1983) (holding that evidence of prior assault was properly admissible to show motive); *United States v. Marshall*, 683 F.2d 1212, 1215 (8th Cir. 1982) (holding that evidence suggesting prior violations of the Food Stamp Act were properly admissible); *United States v. Engleman*, 648 F.2d 473, 478-79 (8th Cir. 1981) (holding that evidence of involvement in

ample, in *United States v. Simmons*,¹¹² the defendant was convicted for unlawful distribution of heroin.¹¹³ The defendant argued that the government should not have been able to offer evidence of his previous convictions for narcotics violations as evidence of predisposition.¹¹⁴ The court of appeals held that this evidence was relevant and probative of the defendant's predisposition to engage in the distribution of heroin.¹¹⁵ The court said that in attempting to prove predisposition, the government may properly introduce evidence of the defendant's prior criminal acts to show that the defendant had a propensity to commit such crimes.¹¹⁶ However, under Rule 404(b), the evidence would be inadmissible if the government tried to use it to prove that the defendant committed the crime as a result of this propensity.¹¹⁷

Other federal courts have been more conservative in allowing the introduction of prior criminal activity. In *United States v. Blankenship*,¹¹⁸ the court held that the use of other criminal acts "is a reliable method of proving the criminal predisposition needed to rebut the allegation or inference of entrapment."¹¹⁹ The court noted that the evidence of other criminal acts must "deal with conduct substantially similar and reasonably near in time to the offenses for which the defendant is being tried."¹²⁰ In *Blankenship*, the defendant was found guilty of unlawfully dealing in firearms, despite his claim that he was entrapped.¹²¹ The issue on appeal was whether the court properly admitted tape recordings of the defendant's admission that he had also purchased some stolen lawn equipment and lumber as evidence of predisposition.¹²² The court decided that the other offenses should not be admissible because they were not substantially similar and had "little if any probative value with respect to the issue of his predisposition."¹²³ On the other hand, when a defendant is charged with posses-

death of business associate and the subsequent collection of insurance proceeds thirteen years prior was properly admitted to show intent).

112. 663 F.2d 107 (D.C. Cir. 1979).

113. *Id.* at 108.

114. *Id.*

115. *Id.* (citing *United States v. Burkley*, 591 F.2d 903, 921 (D.C. Cir. 1978)).

116. *Id.*

117. FED. R. EVID. 404(b) ("Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity . . .").

118. 775 F.2d 735 (6th Cir. 1985).

119. *Id.* at 739 (quoting *United States v. Salisbury*, 662 F.2d 738, 741 (11th Cir. 1981)).

120. *Id.* (citing *United States v. Ring*, 513 F.2d 1001, 1005 (6th Cir. 1975)).

121. *Id.* at 737.

122. *Id.* at 736-38.

123. *Id.* at 740.

sion of marijuana, a prior conviction for heroin possession would likely be considered similar; therefore, the evidence would be admissible.¹²⁴

There is also a question of how close in time the prior act(s) must be to the charged offense in order to be admissible to prove predisposition. In *United States v. Engleman*,¹²⁵ the court stated that "there is no absolute rule regarding the number of years that can separate offenses. Rather, the court applies a reasonableness standard and examines the facts and circumstances of each case."¹²⁶ Evidence of prior acts that occurred more than ten years ago would be contradictory to Federal Rule of Evidence 609(b), which prohibits the use of prior convictions to impeach a witness's credibility when the conviction is more than ten years old, unless the probative value substantially outweighs the potential prejudice. Nonetheless, at least one court has admitted evidence of criminal acts committed more than ten years earlier.¹²⁷

Such evidence of prior criminal acts may properly be excluded under Federal Rule of Evidence 403 if the potential prejudice to the defendant substantially outweighs the probative value of the evidence.¹²⁸ In the context of entrapment claims, however, evidence of prior acts will usually pass this test. "[C]aselaw suggests that evidence of prior similar criminal acts is highly probative of a criminal predisposition" and is usually not outweighed by a danger of prejudice.¹²⁹ As the Court stated in *Sorrells*, a defendant cannot object to the possible prejudice an inquiry into his past causes if he asserts the entrapment defense.¹³⁰

Moreover, the courts have allowed the prosecution to introduce evidence of subsequent acts to show predisposition, subject to the same type of restrictions placed on evidence of prior criminal acts.¹³¹ Such evidence is admitted on the theory that defendant's continuation of

124. See *United States v. Tyson*, 470 F.2d 381, 384-85 (D.C. Cir. 1972) (holding that prior conviction for possession of heroin was properly admitted into evidence to show defendant was predisposed to commit crime of possession of marijuana).

125. 648 F.2d 473, 479 (8th Cir. 1981).

126. *Id.* at 479.

127. See, e.g., *id.* (holding that thirteen year-old conviction was relevant).

128. FED. R. EVID. 403.

129. See Johnson, *supra* note 27, at 398-99.

130. *Sorrells v. United States*, 287 U.S. 435, 451-52 (1932); see *United States v. Burkley*, 591 F.2d 903, 922 (D.C. Cir. 1978) (stating that "once he admits he engaged in the illegal act, a defendant is simply not in a position to be prejudiced should the jury infer from his commission of other crimes that he committed the crime charged").

131. See, e.g., *United States v. Mack*, 643 F.2d 1119, 1121-22 (5th Cir. 1981) (holding that evidence of subsequent criminal acts is properly admissible to prove predisposition); *Burkley*, 591 F.2d at 921-22 (holding that evidence of subsequent acts was properly admissible to show a common plan or scheme).

prohibited acts in instances absent government inducement may indicate that it was not the government's inducement that motivated the defendant to commit the act in question.¹³²

The prosecution has also frequently relied on evidence of the defendant's ready acceptance of the government's inducement to commit the crime as evidence of predisposition.¹³³ In *United States v. Jannotti*,¹³⁴ the defendants were indicted on charges arising from their unlawful receipt of money in exchange for the use of their political power to support a hotel project in Philadelphia.¹³⁵ Although the jury rejected the defendants' entrapment defense, the trial judges set aside the verdict because the government's only evidence of predisposition was the defendants' ready acceptance of the bribes.¹³⁶ The court of appeals disagreed, holding that the evidence presented at trial established that the defendants accepted the money "readily, unprotestingly, even casually"; therefore, there was a substantial basis for the jury's finding that the defendants were predisposed to commit the crime.¹³⁷

In *United States v. Ulloa*¹³⁸ the Second Circuit clearly articulated that the entrapment defense must fail in any instance in which the defendant is "willing" to commit the crime, regardless of whether or not he would have engaged in criminal activity without government inducement.¹³⁹ In *Ulloa*, the trial judge instructed the jurors "that the Government had to prove that the defendant was predisposed, or 'ready and willing,' to commit the crime before the informant's inducement."¹⁴⁰ The jury sent notes to the judge several times asking him to explain what "ready" means.¹⁴¹ The judge stated that "'Ready'

132. Johnson, *supra* note 27, at 401.

133. See *United States v. Ulloa*, 882 F.2d 41 (2d Cir. 1989); *United States v. Jannotti*, 673 F.2d 578 (3d Cir. 1982); see *infra* text accompanying notes 130-40.

134. 673 F.2d 578.

135. *Id.* at 581-89.

136. *Id.* at 597-98.

137. *Id.* at 606.

138. 882 F.2d 41 (2d Cir. 1989).

139. *Id.* at 44.

140. *Id.* at 43.

141. *Id.* at 43-44. After deliberating, the jurors sent the judge a note seeking answers to questions on entrapment. *Id.* The judge brought the jurors into the courtroom, at which time they asked the following questions:

Does the defendant have to have in his mind before the government approaches him that he is going to go and commit a crime?; What if a government agent encountered a person and asked them if they were able to provide him with contacts for narcotics, somebody that was interested in buying drugs asked someone else whether or not they had any contacts, if that person said yes and they would be interested in dealing with him, would that be inducing that person?; You did imply that there was a difference

implies an open amenability to it. It is not terribly different from 'willing.' The two of them together imply a certain amenability to be involved in illegal conduct."¹⁴² The defendant appealed the court's interpretation of predisposition and asserted that "the Government must prove the defendant was not only willing but also ready to commit the crime, in the sense of having the present physical ability to do so."¹⁴³ The Second Circuit rejected this argument, stating that:

The focus of the entrapment inquiry, once inducement by the Government is established, is on the defendant's state of mind. . . . [In the cases in which we found that the defendant was "fully prepared" to act,] we noted the defendant's physical readiness in order to demonstrate why the entrapment defense failed as a matter of law. We did not say that the Government was required to prove readiness in this sense to sustain its burden in proving disposition.¹⁴⁴

Some courts have placed great emphasis on whether or not the defendant readily responded to the inducement offered. In *United States v. Jones*,¹⁴⁵ the Seventh Circuit held that "[t]he most important factor for the court to focus upon is the defendant's reluctance to commit the offense. Such reluctance is a good indicator that the government's actions motivated the defendant to commit the offense, thereby removing culpability from the defendant."¹⁴⁶ On occasion, the defendant's lack of reluctance alone may be sufficient to prove predisposition.¹⁴⁷ Conversely, in instances where reluctance to commit the crime is shown, the government has had a much more difficult time proving predisposition.¹⁴⁸ In fact, the Supreme Court has allowed a defendant to introduce evidence of his reluctance to engage in the crime in order to show that he was entrapped.¹⁴⁹

between willingness, which I think is not an issue here, and readiness. Can you define readiness with any more specificity?

Id. at 44.

142. *Id.* at 44.

143. *Id.*

144. *Ulloa*, 882 F.2d at 44.

145. 950 F.2d 1309 (7th Cir. 1991).

146. *Id.* at 1314.

147. See, e.g., *United States v. Reynoso-Ulloa*, 548 F.2d 1329 (9th Cir. 1977). "[W]e have found no case in which the defense of entrapment . . . was successful where the defendant had not indicated reluctance to engage in illegal activity." *Id.* at 1336 n.11.

148. MARCUS, *supra* note 30, § 4.13, at 144.

149. See *Sherman v. United States*, 356 U.S. 369, 373 (1958) (relying on the testimony of an informant that "one request was not enough, . . . additional ones were necessary to overcome, first, petitioner's refusal, then his evasiveness, and then his hesitancy in order to achieve capitulation" in holding that defendant was entrapped as a matter of law).

C. Jacobson v. United States

The most recent Supreme Court case dealing with the entrapment defense was in 1992 in *Jacobson v. United States*.¹⁵⁰ In *Jacobson*, the defendant ordered two magazines entitled *Bare Boys I* and *Bare Boys II* containing photos of nude teenage boys.¹⁵¹ At the time, his actions were perfectly legal, but three months later, Congress passed 18 U.S.C. § 2252(a)(2)(A), which criminalized “the knowing receipt through the mails of a visual depiction [that] involves the use of a minor engaging in sexually explicit conduct”¹⁵² In that same month, postal inspectors found Jacobson’s name on a mailing list from a California bookstore that indicated his earlier receipt of *Bare Boys I* and *Bare Boys II*.¹⁵³ Government agents then began sending Jacobson letters from fictitious organizations in an attempt to solicit orders for child pornography.¹⁵⁴ Some of these mailings were from organizations purporting to protect First Amendment rights with regard to pornographic material.¹⁵⁵ Jacobson enrolled in one of these organizations and filled out various questionnaires indicating that his interest in “[p]reteen sex-homosexual material” was above average.¹⁵⁶ Finally, twenty-six months after the mailings commenced, the government sent a letter inviting Jacobson to send for more information about a method of receiving pornography “without prying eyes of U.S. Customs seizing your mail.”¹⁵⁷ The defendant responded and a catalogue was sent to him from which he ordered a pornographic magazine depicting young boys engaged in various sexual activities.¹⁵⁸ Jacobson was arrested and indicted for violating 18 U.S.C. § 2252(a)(2)(A).¹⁵⁹

Although Jacobson raised the defense of entrapment at trial, he was convicted in the United States District Court for the District of Nebraska of “knowingly receiving through the mails sexually explicit material depicting a minor.”¹⁶⁰ Upon a rehearing en banc, the Eighth Circuit Court of Appeals found that there was sufficient evidence to

150. 503 U.S. 540 (1992).

151. *Id.* at 542-43.

152. *Id.* at 542.

153. *Id.* at 543.

154. *Id.*

155. *Id.* at 545.

156. *Jacobson*, 503 U.S. at 544.

157. *Id.* at 546-47.

158. *Id.* at 547.

159. *Id.*

160. *United States v. Jacobson*, 916 F.2d 467, 468 (8th Cir. 1990), *rev'd*, 503 U.S. 554 (1992) (citing 18 U.S.C. § 2252(a)(2) (Supp. V 1987)).

support the conviction and affirmed the trial court's decision.¹⁶¹ The court held that "this is not a case in which the government was a manufacturer rather than a detector of crime."¹⁶² The court felt that "the postal inspectors only provided Jacobson with opportunities to purchase child pornography."¹⁶³

In a five to four decision, the Supreme Court held that Jacobson was entrapped as a matter of law: "[r]ational jurors could not say beyond a reasonable doubt that petitioner possessed the requisite predisposition prior to the Government's investigation and that it existed independent of the Government's many and varied approaches to petitioner."¹⁶⁴ After considering Jacobson's background and character, the majority held that he did not have a predisposition to commit the crime.¹⁶⁵ In finding a lack of predisposition, the Court relied on the fact that the defendant was an otherwise law-abiding citizen,¹⁶⁶ with the exception of a Driving While Under the Influence conviction in 1958.¹⁶⁷

The majority opinion, written by Justice White, reiterated that when the government has induced an individual to commit a crime and the defendant raises the entrapment defense, the prosecution must prove beyond a reasonable doubt that the defendant was predisposed to commit that crime.¹⁶⁸ The majority opinion did not offer a test for determining predisposition but noted that in this instance, the government did not prove predisposition independent of government involvement.¹⁶⁹ Justice White added that the defendant's ready response to the government solicitations cannot be enough to establish that he was predisposed to commit the crime.¹⁷⁰ The Court concluded that "[w]hen the Government's quest for convictions leads to the apprehension of an otherwise law-abiding citizen who, if left to his own devices, likely would have never run afoul of the law, the courts should intervene."¹⁷¹

Justice O'Connor, writing for the dissent, criticized the majority's approach, stating that "[t]he Court seems to add something new to the

161. *Id.* at 470.

162. *Id.*

163. *Id.*

164. *Jacobson*, 503 U.S. at 553.

165. *Id.*

166. *Id.*

167. *Jacobson*, 916 F.2d at 471.

168. *Jacobson*, 503 U.S. at 548-49.

169. *Id.* at 550.

170. *Id.* at 553.

171. *Id.* at 553-54.

burden of proving predisposition. Not only must the Government show that a defendant was predisposed to engage in the illegal conduct . . . but also that the defendant was predisposed to break the law knowingly in order to do so.”¹⁷² The majority answered Justice O’Connor in a footnote, stating that the dissent was mistaken in its claim that this predisposition requirement is an “innovation in entrapment law.”¹⁷³

Justice O’Connor also argued that the majority altered the entrapment defense by compelling a prosecutor to show that the defendant possessed a predisposition prior to the government’s first contact with the defendant.¹⁷⁴ She stated:

The rule that preliminary Government contact can create a predisposition has the potential to be misread by lower courts as well as criminal investigators as requiring that the Government must have sufficient evidence of a defendant’s predisposition *before it ever seeks to contact him*. Surely the Court cannot intend to impose such a requirement, for it would mean that the Government must have a reasonable suspicion of criminal activity before it begins an investigation, a condition that we have never before imposed.¹⁷⁵

D. The Circuit Split in the Wake of *Jacobson*

The circuit court decisions reflect confusion over the predisposition requirement enunciated in *Jacobson*. Some courts have shifted toward a heightened level of scrutiny in determining predisposition, requiring that the government show that the defendant would have engaged in the criminal activity without government inducement.¹⁷⁶ Other courts have held that *Jacobson* merely applied already existing entrapment law and have found predisposition using traditional factors.¹⁷⁷

In *United States v. Gendron*,¹⁷⁸ then First Circuit Chief Judge Breyer held that *Jacobson* requires the government to show how a defendant would have reacted had he been faced with an “ordinary opportunity to commit the crime.”¹⁷⁹ In *Gendron*, the government found Gendron’s name on a “naked children” mailing list and sent

172. *Id.* at 559-60. (O’Connor, J., dissenting).

173. *Id.* at 549 n.2.

174. *Jacobson*, 503 U.S. at 556 (O’Connor, J., dissenting).

175. *Id.* at 557.

176. *See, e.g.*, *United States v. Hollingsworth*, 27 F.3d 1196, 1199-1200, 1202 (7th Cir. 1994).

177. *See, e.g.*, *United States v. Thickstun*, 110 F.3d 1394 (9th Cir.), *cert. denied*, 118 S. Ct. 305 (1997).

178. 18 F.3d 955 (1st Cir. 1994).

179. *Id.* at 962-63.

him pornography solicitations over a period of time.¹⁸⁰ Upon first receiving a catalogue, he ordered two titles and included a letter indicating how excited he was to receive the material.¹⁸¹ The government did not fill that order, but three years later Gendron again responded to a solicitation by ordering more pornography.¹⁸² The third time the government sent a child pornography catalogue, Gendron again placed an order and later sent a letter illustrating his desire to receive the materials.¹⁸³ This time the government sent the materials, and Gendron was arrested.¹⁸⁴

After comparing the case with *Jacobson*, the First Circuit Court of Appeals held that Gendron was not entrapped as a matter of law because the evidence revealed that Gendron "would have responded affirmatively to the most ordinary of opportunities, and hence, was 'predisposed' to commit the crime."¹⁸⁵ Judge Breyer opined that in determining predisposition, courts cannot simply inquire whether the defendant "would likely have committed the crime" without the government activity because if the government would not have presented the opportunity, the defendant, no matter how predisposed, would likely not have acted.¹⁸⁶ Instead, "we should ask how the defendant likely would have reacted to an *ordinary* opportunity to commit the crime."¹⁸⁷ Judge Breyer defined ordinary as lacking "those special features of the government's conduct that made of it an 'inducement', or an 'overreaching.'"¹⁸⁸ He stated that asking the question in this manner prevents one from concluding simply from the fact that the defendant committed the crime that he was predisposed to do so.¹⁸⁹ He opined that the Court's decision in *Jacobson* to find entrapment as a matter of law was a result of the government's failure to "show how Jacobson would have acted had he been faced with an ordinary 'opportunity' to commit the crime rather than a special 'inducement.'"¹⁹⁰

The majority held that Gendron was predisposed to commit the crime based on the evidence, which in its opinion, revealed an enthusi-

180. *Id.* at 964.

181. *Id.*

182. *Id.*

183. *Id.* In the letter he asked "if the firm had 'forgotten' his order, making clear that he still wanted 'this type of educational materials,' stating, 'don't worry, I am not connected in any way with law enforcement,' and adding 'Please Hurry.'"*Id.*

184. *Gendron*, 18 F.3d at 964.

185. *Id.*

186. *Id.* at 962.

187. *Id.*

188. *Id.*

189. *Id.* at 963.

190. *Gendron*, 18 F.3d at 963.

astic participant who continuously responded to government solicitations "far less extensive than in *Jacobson*."¹⁹¹ This enthusiasm was displayed under the most ordinary of opportunities, and unlike Jacobson, he was not solicited under a guise of an anti-censorship plan.¹⁹² Such evidence that a defendant would commit the crime in the most ordinary of opportunities, in the majority's opinion, shows that Gendron was predisposed to commit the crime, which defeats his claim of entrapment.¹⁹³

Other circuits did not share Breyer's interpretation of the *Jacobson* decision. In *United States v. Hollingsworth*,¹⁹⁴ Judge Posner, writing for the Seventh Circuit, interpreted the "something new" aspect of predisposition that Justice O'Connor alluded to in her dissent in *Jacobson* as requiring that a defendant be in a "position" to have actually committed the crime without government involvement.¹⁹⁵ In *Hollingsworth*, the defendants were an orthodontist and a farmer who had failed at numerous business ventures.¹⁹⁶ They decided to become international financiers, but they had no customers and were rapidly losing all their money.¹⁹⁷ One of the defendants placed an advertisement in the *USA Today* offering to sell one of the foreign banking licenses he had obtained.¹⁹⁸ A United States customs agent saw the ad and assumed that someone who dealt with foreign banks might be someone who would be interested in laundering money.¹⁹⁹ The agent then contacted Pickard, the defendant, about depositing money offshore.²⁰⁰ At first, Pickard suggested legal methods of depositing the money but later suggested illegal ways in which he could structure the deposit to avoid federal reporting requirements.²⁰¹ In the alternative, Pickard suggested that the agent could deposit the money outside of the United States.²⁰² At this point the agent initiated "a formal investigation to determine the past and present unlawful activities of William Pickard," which revealed no prior activities.²⁰³ Later, Pickard retracted his suggestion that the money be deposited outside the United

191. *Id.* at 964.

192. *Id.*

193. *Id.*

194. 9 F.3d 593 (7th Cir.), *aff'd on reh'g*, 27 F.3d 1196 (7th Cir. 1994) (en banc).

195. *United States v. Hollingsworth*, 27 F.3d. 1196, 1200 (7th Cir. 1994).

196. *Id.*

197. *Id.*

198. *Id.*

199. *Id.*

200. *Id.*

201. *Hollingsworth*, 27 F.3d at 1200-01.

202. *Id.* at 1201.

203. *Id.*

States because it was illegal; thus, there was no evidence that Pickard knew that structuring a deposit to avoid federal reporting requirements also violated the law.²⁰⁴ After about six months, the agent contacted Pickard again and gave him \$20,000, which he said came from gun smuggling.²⁰⁵ Pickard took that money and also participated in subsequent transactions totaling \$200,000.²⁰⁶ Hollingsworth was also involved in these dealings.²⁰⁷ Finally, when the defendants again attempted to launder another large sum of money, they were arrested.²⁰⁸ The district court rejected a defense of entrapment as a matter of law.²⁰⁹

The United States Court of Appeals for the Seventh Circuit reversed the district court's holding and acquitted both defendants.²¹⁰ The court held that the government essentially "turned two harmless, though weak, foolish, and in Pickard's case at least, greedy, men into felons" by entrapping them.²¹¹ The court based this decision on the Supreme Court's holding in *Jacobson*, which it believed significantly changed the entrapment defense.²¹² Judge Posner argued vehemently that *Jacobson* illustrates that predisposition cannot be judged accurately simply from the defendant's response to governmental inducements.²¹³ Judge Posner pointed out that if the Court in *Jacobson* believed that an adequate showing of predisposition can be achieved solely by the defendant's demonstrated willingness to commit the

204. *Id.*

205. *Id.*

206. *Id.*

207. *Hollingsworth*, 27 F.3d at 1201.

208. *Id.*

209. *United States v. Hollingsworth*, 9 F.3d 593, 595 (7th Cir. 1993).

210. *Id.* at 602.

211. *Hollingsworth*, 27 F.3d at 1202.

212. *Id.* at 1198. The majority stated that "Cases both in this and in other circuits, besides the panel decision in this case, recognize that *Jacobson* has changed the landscape of the entrapment defense." *Id.*

213. *Id.* at 1199. Judge Posner stated:

We put the following hypothetical case to the government's lawyer at the reargument. Suppose the government went to someone and asked him whether he would like to make money as a counterfeiter, and the reply was, "Sure, but I don't know anything about counterfeiting." Suppose the government then brought him a printer, paper, and ink, showed him how to make the counterfeit money, hired a staff for him, and got everything set up so that all he had to do was press a button to print the money; and then offered him \$10,000 for some quantity of counterfeit bills. The government's lawyer acknowledged that the counterfeiter would have a strong case that he had been entrapped, even though he was perfectly willing to commit the crime once the government planted the suggestion and showed him how and the government neither threatened him nor offered him an overwhelming inducement.

Id.

crime, then Jacobson would have been predisposed.²¹⁴ The government did not have to badger Jacobson to overcome his resistance to committing the crime.²¹⁵ In fact, he never actually resisted.²¹⁶ If Jacobson were predisposed, then the Court's decision would be difficult to explain.²¹⁷

Judge Posner made it clear that he wasn't suggesting that *Jacobson* adds a new element to the entrapment defense. Instead, he stated that the Court "clarified the meaning of predisposition."²¹⁸ Posner stated:

Predisposition is not a purely mental state, the state of being willing to swallow the government's bait. It has positional as well as dispositional force. . . . The defendant must be so situated by reason of previous training or experience or occupation or acquaintances that it is likely that if the government had not induced him to commit the crime some criminal would have done so; only then does a sting or other arranged crime take a dangerous person out of circulation. . . . It is different when the defendant is not in a position without the government's help to become involved in illegal activity. The government "may not provoke or create a crime, and then punish the criminal, its creature."²¹⁹

The court felt that the defendants would not have been in the position to commit the criminal acts if it were not for the government's involvement.²²⁰ Accordingly, the government failed to satisfy its burden of proof because a criminal predisposition produced by the government's activities cannot defeat a claim of entrapment.²²¹

Judge Posner also made it clear that the court was not of the opinion that a "lack of *present* means to commit a crime is alone enough to establish entrapment if the government supplies the means."²²² In a case where the defendant already had the idea for the crime but lacked the means to commit it, and the government provided those means, the entrapment defense would fail because the defendant was already predisposed to commit it.²²³ In Judge Posner's opinion, un-

214. *Id.*

215. *Id.*

216. *Id.*

217. *Hollingsworth*, 27 F.3d at 1199.

218. *Id.* at 1200.

219. *Id.* (citation omitted).

220. *Id.* at 1202.

221. *Id.* at 1203.

222. *Id.* at 1202.

223. *Hollingsworth*, 27 F.3d at 1202-03.

Suppose that before Hinch chanced on the scene (for *Jacobson* makes clear, as we have noted, that a predisposition *created* by the government cannot be used to defeat a defense of entrapment), Pickard had decided to smuggle arms to Cuba but didn't know where to buy a suitable boat. On a hunch, a government agent sidles up to Pickard and

dercover operations are appropriate in instances where the person would have committed a crime absent government inducement, but the government officers are able to induce the person to commit the crime *now* in order that they may apprehend and convict the person.²²⁴ As Judge Posner stated, "[t]he defense of entrapment reflects the view that the proper use of the criminal law in a society such as ours is to prevent harmful conduct for the protection of the law abiding, rather than to purify thoughts and perfect character."²²⁵

Judge Ripple, writing a dissenting opinion, saw things quite differently.²²⁶ He stated that the government "departed radically from the established law of this circuit, and, more importantly, from the governing precedent of the Supreme Court of the United States."²²⁷ He protested that the majority's "positional" predisposition test added a new element to the entrapment defense by requiring that the government establish the defendant's "readiness" to commit the crime.²²⁸ Although readiness had been employed in the past,²²⁹ Judge Ripple argued that the majority changed the meaning of "ready" from "one who is inclined, feeling or exhibiting no reluctance, to *one on the point of acting*."²³⁰ In doing so, the majority has departed from controlling caselaw and well-settled precedent.²³¹ In his view, a showing of "read-

gives him the address of a boat dealer; and Pickard is arrested after taking possession of the boat and setting sail, and is charged with attempted smuggling. That would be a case in which the defendant had the idea for the crime all worked out and lacked merely the present means to commit it, and if the government had not supplied them someone else very well might have. It would be a case in which the government had merely furnished the opportunity to commit the crime to someone already predisposed to commit it.

Id. at 1203.

224. *Id.*

A person who is likely to commit a particular type of crime without being induced to do so by government agents, although he would not have committed it when he did but for the inducement, is a menace to society and a proper target of law enforcement. The likelihood that he has committed this type of crime in the past or will do so in the future is great, and by arranging for him to commit it now, in circumstances that enable the government to apprehend and convict him, the government punishes or prevents real criminal activity. The government's inducement affects the timing of the offense; it does not create the offense by exploiting the susceptibility of a weak-minded person.

Id.

225. *Id.*

226. *Id.* at 1213.

227. *Id.*

228. *Id.* at 1214.

229. *Hollingsworth*, 27 F.3d at 1215 (citing *Jacobson v. United States*, 503 U.S. 540, 550 (1992)); see *United States v. Kusmaul*, 987 F.2d 345, 349 (6th Cir. 1993); *United States v. Tejada*, 974 F.2d 210, 217-18 (1st Cir. 1992).

230. *Hollingsworth*, 27 F.3d at 1215 (emphasis added).

231. *Id.*

iness” was no more than “circumstantial evidence that is relative and probative evidence of whether defendant was in fact predisposed to commit the offense.”²³²

In *United States v. Thickstun*,²³³ the Ninth Circuit adopted yet another approach to the government’s burden in proving predisposition. In that case, an IRS agent was investigating John Nazaroff’s unpaid taxes with total liability estimated at \$785,000.²³⁴ “During the audit, Nazaroff offered [the agent] a modeling job, which [he] perceived as a bribe overture.”²³⁵ The agent notified his superior, took a bribery awareness course, and began surveillance.²³⁶ Ultimately, Nazaroff offered the agent \$5,000 to “zero out” his tax liability.²³⁷ He also asked the agent to help his friend Charlot Thickstun who owed the IRS \$476,000 in unpaid taxes including interest and penalties.²³⁸ Unlike Nazaroff, Thickstun had begun an offer and compromise process with the IRS but had not yet reached a settlement.²³⁹ She had retained an attorney and planned to meet her tax obligations before she was approached by Nazaroff with the agent’s offer to accept a bribe in return for reducing her tax liability to zero.²⁴⁰ When Nazaroff first contacted her with this offer, Thickstun declined.²⁴¹ When the agent contacted Thickstun, she explained to the agent that she was in a bad financial situation.²⁴² The agent then suggested that Thickstun get the money back from her tax attorney to finance the bribe.²⁴³ The agent stated that Thickstun could make monthly payments for the difference, and Thickstun finally agreed.²⁴⁴ The agent recorded these conversations,

232. *Id.* at 1214.

233. 110 F.3d 1394 (9th Cir.), *cert. denied*, 118 S. Ct. 305 (1997).

234. *Id.* at 1396.

235. *Id.*

236. *Id.*

237. *Id.*

238. *Id.*

239. *Thickstun*, 110 F.3d at 1396.

240. Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit, at 9, *Thickstun*, 110 F.3d 1394 (citation omitted).

241. *Id.* at 8 (citations omitted). Nazaroff told the undercover agent that: “[A]s far as Charlot goes, though, she doesn’t know that she wants to do anything now because she doesn’t have a job. She’s caring for her mother who as brain cancer. She’s kind of in a destitute situation right now.” *Id.*

242. *Id.* at 9 (citations omitted).

243. *Id.* (citations omitted). The agent stated: “[J]ust go ahead and say WELL, I’s gonna try it this WAY. Uh, you’ve already done the paperwork on a [sic] audit reconsideration and I’m, uh, already working on it and that you wanna try it on your own for a while, and, uh, if you can’t get things straightened out that you’ll, uh, retain him later.” *Id.*

244. *Id.* at 10 (citations omitted). The agent said “[I]f you could go ahead and give me three [thousand dollars] when we sign the report and zero out all your taxes, okay, and then, uh, leave, yeah, just small monthly payments.” *Id.*

and as a result, both Thickstun and Nazaroff were arrested and charged with "bribery of a public official."²⁴⁵ Thickstun argued that she had been entrapped as a matter of law on two grounds. First, she argued that the government induced the crime.²⁴⁶ Second, Thickstun argued that she lacked the predisposition to commit bribery.²⁴⁷

The court was not completely forthright in its description of the background facts of the case. The court stated that "[Thickstun] offered to pay [the agent] \$4,000 up front and \$1,000 later, if he would do the same thing for her that he had done for Nazaroff."²⁴⁸ The court failed to mention that when Nazaroff first contacted Thickstun with this offer, she declined. The court also failed to mention that Thickstun initially explained to the agent that she was in a bad financial situation and that it was the agent who suggested that she stop working with her tax attorney and use the retainer money to finance the bribe.²⁴⁹ As will be illustrated, such facts become important when the issue of predisposition is examined under the *Hollingsworth* and the *Gendron* approaches.

If Thickstun's case had been heard in the Seventh Circuit, the government would have had to prove not only that the defendant possessed the mental state, or disposition, to commit the crime but also that the defendant was in a "position" to commit the crime.²⁵⁰ Instead, the Ninth Circuit applied a different standard, which requires the government to prove predisposition by way of a multi-element test in which the fact-finder must analyze: "(1) the defendant's character and reputation; (2) whether the government initially suggested the criminal activity; (3) whether the defendant engaged in the activity for profit; (4) whether the defendant showed any reluctance; and (5) the nature of the government's inducement."²⁵¹ This standard had previously been applied by other courts as well.²⁵²

245. *Thickstun*, 110 F.3d at 1396.

246. *Id.*

247. *Id.*

248. *Id.*

249. Petition for Writ of Certiorari, at 9, *Thickstun*, 110 F.3d 1394 (citations omitted).

250. See *supra* notes 218-25 and accompanying text.

251. *Thickstun*, 110 F.3d at 1396 (citation omitted).

252. The Eighth Circuit also adopted a multi-element test in *United States v. Dion*, 762 F.2d 674, 687-88 (8th Cir. 1985), *rev'd on other grounds*, 476 U.S. 734 (1986). The court identified 10 factors to be evaluated in determining predisposition:

(1) whether the defendant readily responded to the inducement offered; (2) the circumstances surrounding the illegal conduct; (3) the state of mind of a defendant before the government agents make any suggestion that he shall commit a crime; (4) whether the defendant was engaged in an existing course of conduct similar to the crime for which he is charged; (5) whether the defendant had already formed the "design" to commit the crime for which he is charged; (6) the defendant's reputation; (7) the conduct of the

In rejecting Thickstun's arguments to the contrary, the Ninth Circuit concluded that she was not entrapped as a matter of law.²⁵³ The court held that a jury could conclude that the defendant was predisposed to commit the crime based on the facts of the case: (1) Thickstun owed almost half a million dollars to the IRS; (2) the jury heard wiretapped conversations between Thickstun and the agent in which Thickstun broached the topic of bribery; (3) she did not dispute that she engaged in the activity for profit; and (4) she showed no reluctance to commit the crime.²⁵⁴ The court relied most heavily on the defendant's lack of reluctance to commit the crime, commenting on the "receptivity" she expressed in her conversations with the agent.²⁵⁵ The court was unpersuaded by the fact that Thickstun's eagerness to commit the crime arose after the agent had met her, stating that "the jury could rely on it to find that she was already predisposed to commit the crime."²⁵⁶

In reaching its decision, the court also rejected the notion that in determining predisposition, Supreme Court precedent requires a showing that the defendant was in a position to commit the crime, absent any government assistance.²⁵⁷ Instead, the court concluded that such an interpretation would unnecessarily expand the entrapment defense by making a person's ability to commit a crime a separate element to be proven.²⁵⁸ The court held that *Jacobson* does not create "a requirement of positional readiness" but instead applied "settled entrapment law."²⁵⁹

In sum, the federal courts have articulated at least three different standards for proving predisposition. The First Circuit has adopted the "ordinary opportunity" test, meaning that the government must only show that absent government inducement, the defendant would have committed the crime if he had been faced with an "ordinary opportunity."²⁶⁰ The Seventh Circuit, on the other hand, has adopted a "positional" test, which requires the government to prove not only

defendant during negotiations with the undercover agent; (8) whether the defendant has refused to commit similar acts on other occasions; (9) the nature of the crime charged; (10) the degree of coercion present in the instigation law officers have contributed to the transaction relative to the defendant's criminal background.

Id. at 687-88 (citations omitted).

253. *Thickstun*, 110 F.3d at 1397.

254. *Id.*

255. *Id.*

256. *Id.*

257. *Id.* at 1398.

258. *Id.*

259. *Thickstun*, 110 F.3d at 1398.

260. *See supra* notes 178-93 and accompanying text.

that the defendant possessed the mental state, or disposition, to commit the crime but also that the defendant was in a position to commit the crime.²⁶¹ This requires the defendant to be able and likely, based on experience, training, and contacts, to commit the crime. Finally, the Ninth Circuit has adopted a multi-element test in which the court looks to a variety of relevant facts in determining predisposition.²⁶²

II. ANALYSIS

The entrapment defense arose from the need to protect the "otherwise law-abiding citizen" from government officials who might prey upon their needs and weaknesses in order to persuade them to commit crimes.²⁶³ Without the entrapment defense, there would not be enough restriction on the government, meaning that it would be free to go out and create crime by corrupting the innocent. The role of the court then is to protect the government itself from the illegal acts of its officers.²⁶⁴ The courts fail in this role when they find that the government has satisfied its burden of proving predisposition in instances "[w]hen the government's quest for convictions leads to the apprehension of an otherwise law-abiding citizen who, if left to his own devices, likely would have never run afoul of the law. . . ."²⁶⁵ Unfortunately, the Supreme Court has declined to define how courts can make this determination by refusing to settle the split in the federal circuits regarding what constitutes proof of predisposition.²⁶⁶

The manner in which courts are determining predisposition has definitely changed in light of Supreme Court precedent, especially *Jacobson*. Some courts have begun to place the notion of predisposition in proper context by inquiring whether the defendant likely would have committed the crime without government involvement, rather than merely inquiring whether the defendant was an enthusiastic participant.²⁶⁷ As the *Hollingsworth* court noted:

What is true is that until the Supreme Court's recent decision in *Jacobson*, . . . the courts of appeals had been drifting toward the view . . . that the defense of entrapment must fail in any case in

261. See *supra* notes 218-25 and accompanying text.

262. See *supra* notes 251-52 and accompanying text.

263. *Casey v. United States*, 276 U.S. 413, 423 (1928).

264. *United States v. Jannotti*, 501 F. Supp. 1182, 1187 (E.D. Pa. 1980) (discussing *Sorrells v. United States*, 287 U.S. 435, 446 (1932)).

265. *Jacobson v. United States*, 503 U.S. 540, 553-54 (1992).

266. Compare *United States v. Hollingsworth*, 27 F.3d 1196 (7th Cir. 1994) (adopting the view that a person must have been in the position to commit the crime in question prior to government inducement) with *United States v. Thickstun*, 110 F.3d 1394 (9th Cir.), *cert. denied*, 119 S. Ct. 305 (1997) (adopting varying approaches for determining predisposition).

267. Marcus, *supra* note 24, at 230.

which the defendant is "willing," in the sense of being psychologically prepared, to commit the crime for which he is being prosecuted, even if it is plain that he would not have engaged in criminal activity unless "inveigled or assisted by the government."²⁶⁸

The circuit court decisions interpreting the definition of predisposition provided in *Jacobson* are still divided. An examination of each of the different approaches reveals the disparities between the circuits and a lack of consistent legal analysis present in determining whether the defendants were entrapped as a matter of law.²⁶⁹ It appears that defendants such as Thickstun, who if left to her own devices likely would have "never run afoul of the law," are on the losing end of these divided opinions.²⁷⁰

A. The Positional Test

In many cases, the Ninth Circuit's failure to require the government to prove that the defendant was in a position to commit the crime would not alter the defendant's opportunity to successfully claim entrapment.²⁷¹ If the government's only involvement was to provide an opportunity to accept a bribe, then the defendant was probably in a "position" to offer a bribe anyway and was therefore not lacking predisposition. When the government, however, deliberately targets an individual, and its involvement was greater than simply creating an opportunity to commit the crime, the person may not have been in a position to commit the crime. Courts are therefore unable to con-

268. *Hollingsworth*, 27 F.2d at 1198 (citations omitted).

269. See, e.g., *United States v. Knox*, 112 F.3d 802 (5th Cir. 1997) *overruled by* *United States v. Brace*, 145 F.3d 247 (5th Cir. 1998) (en banc). The Fifth Circuit initially held that a preacher was entrapped as a matter of law because the government did not prove that he was "likely to engage in money laundering absent the government's conduct." *Id.* at 804. The court recognized that Judge Posner's interpretation of *Jacobson* has not been embraced by all of the circuits but nonetheless was persuaded that *Hollingsworth* was correctly decided. *Id.* at 808 (citations omitted). Accordingly, the Fifth Circuit held that "[t]he Supreme Court instructs that in determining predisposition we are to ask what the defendant would have done absent government involvement." *Id.* The court further noted that in order "[t]o give effect to that command, we must look not only to the defendant's mental state (his 'disposition'), but also to whether the defendant was able and likely, based on experience, training and contacts, to actually commit the crime (his 'position')." *Id.* The Fifth Circuit reversed this ruling on rehearing en banc. *Brace*, 145 F.3d at 250. The new panel refused to consider whether a "positional predisposition" element was required, claiming that the defendant did not present such a claim to the district court or the appellate court. *Id.* at 259-60. Instead, the court applied the "well-established and understood precedent as to entrapment" and found that the evidence at trial was sufficient for a rational juror to conclude that *Brace* was predisposed to launder money. *Id.* at 247, 265.

270. Compare *Hollingsworth*, 27 F.3d 1196 (adopting the view that the person must have been in position to commit the crime in question prior to government inducement) with *Thickstun*, 110 F.3d 1934 (adopting varying approaches for determining predisposition).

271. *Thickstun*, 110 F.3d at 1394.

clude that the defendant is an "unwary criminal" rather than an "unwary innocent" victim. It is in these instances that the Ninth Circuit's interpretation of predisposition does not afford sufficient protection to criminal defendants.

While the court in *Thickstun* relied heavily on the defendant's lack of reluctance,²⁷² a better inquiry would have been whether the defendant was in a position to commit the crime prior to government involvement. After all, many people in Thickstun's financial distress, would not display reluctance to the idea of eliminating a debt totaling nearly a half a million dollars simply by paying an IRS agent \$5,000. This lack of reluctance alone should not be sufficient evidence that a debtor would actually bribe an agent. As Justice O'Connor suggested in her dissent, the significance of *Jacobson* lies in the adoption of a requirement that the government show that the defendant was predisposed prior to the government's first contact.²⁷³ By examining a defendant's reluctance in an attempt to show predisposition, the government is utilizing evidence of the defendant's actual reaction to the government's first contact. It seems that such an examination runs contrary to the requirement that the government establish predisposition "prior to the Government acts intended to create predisposition."²⁷⁴

The positional predisposition element is essential because the difference between committing a crime and obeying the law is, in part, whether the individual has the capacity to commit the crime. Despite a willingness to commit a crime, most people rarely break the law. If this is true, then in order to distinguish the otherwise innocent defendant from the unwary criminal, courts should require the government to establish that the defendant had the capacity to commit the crime. The Supreme Court recognized as early as 1958 that effective law enforcement does not require the government to play on the weaknesses of an otherwise innocent defendant.²⁷⁵ The government has not been assigned the task of originating criminal design, implanting the disposition in the mind of an otherwise innocent person, and then inducing that person to commit the crime.

After looking at the Supreme Court's decision in *Jacobson*, it seems clear that had the Supreme Court believed that a finding of predisposition could be "made by the demonstrated willingness of the defend-

272. *Id.* at 1397.

273. *Jacobson v. United States*, 503 U.S. 540, 549 n.2 (1992).

274. *Id.* at 552.

275. *Sherman v. United States*, 356 U.S. 369, 376 (1958).

ant," it would have concluded that Jacobson was predisposed.²⁷⁶ "The government did not offer Jacobson any inducements to buy pornographic magazines or threaten him with harm if he failed to buy them. It was not as if the government had had to badger Jacobson for 26 months in order to overcome his resistance to committing a crime. He *never* resisted."²⁷⁷ Jacobson appeared to the Court to be that "otherwise law-abiding citizen who, if left to his own devices, likely would have never run afoul of the law."²⁷⁸ Thus, the emphasis was not on Jacobson's willingness but rather on his mental state prior to government inducements.

The Court stated that "[w]hen the Government's quest for convictions leads to the apprehension of an otherwise law-abiding citizen who, if left to his own devices, likely would have never run afoul of the law, the courts should intervene."²⁷⁹ The problem is that the Court failed to articulate how to determine just who might be that "otherwise law-abiding citizen" by failing to outline how predisposition should be determined. It appears that the key inquiry is whether the defendant is someone who, without government contact, "likely would have never run afoul of the law."²⁸⁰ Beyond that, the Court has not spoken on how to determine if a defendant is such a person.

In answering such questions, one must remember that the goal is to protect the otherwise law-abiding citizens from government officials who stand ready to prey upon their needs and weaknesses in attempts to persuade them to commit crimes.²⁸¹ Such citizens do not pose a threat to society and therefore are not proper subjects of criminal charges. When a government official actually implants the disposition in the mind of an otherwise innocent person and induces that person to commit the crime, the courts must protect that person from prosecution. As *Thickstun* illustrates, the Supreme Court has yet to protect the "otherwise innocent person" because it has failed to articulate a method of determining predisposition that will reliably provide such protection.

Judge Posner's reasoning that proof that the defendant was predisposed to commit the crime must contain a "positional" element appears to be the most successful at separating the "unwary innocent" from the "unwary criminal."²⁸² It provides real protection because it

276. *Hollingsworth v. United States*, 27 F.3d 1196, 1199 (7th Cir. 1994).

277. *Id.*

278. *Jacobson*, 503 U.S. at 553-54.

279. *Id.*

280. Marcus, *supra* note 24, at 231.

281. *Jacobson*, 503 U.S. at 553-54.

282. *Sherman v. United States*, 356 U.S. 369, 372 (1958).

inquires into whether the defendant would have committed the crime if the government had not been involved. This is workable because if a defendant is only able to commit the crime when the government steps in and provides the means to do so, then a court cannot really find that he is a dangerous individual who should be punished.²⁸³ This conclusion comports with the Supreme Court's first analysis of the entrapment defense in *Sorrells*.²⁸⁴ In *Sorrells*, the court said that:

[I]t is unconscionable, contrary to public policy, and to the established law of the land to punish a man for the commission of an offense of the like of which he had never been guilty, either in thought or in deed, and evidently never would have been guilty of it if the officers of the law had not inspired, incited, persuaded, and lured him to attempt to commit it.²⁸⁵

The *Hollingsworth* decision has been sharply criticized by both judges and legal scholars on the grounds that allowing readiness to become an independent element of the entrapment defense would be extremely burdensome for law enforcement officials.²⁸⁶ Some argue that "[i]t will create a new obstacle that the government will have to satisfy, above and beyond the requirement of proving predisposition."²⁸⁷ In actuality, the government should have to show that the defendant was in a "position" to have actually committed the crime without government involvement, in order to prove that he would have committed the crime without government involvement. One who was not in a position to do so can hardly be said to have been predisposed. This may only be considered a new obstacle because it had not been articulated before *Hollingsworth*, but in fact, it has been a requirement since the Court's decision in *Sherman*. Without such a requirement, there would be difficulty in separating the "unwary innocent" from the "unwary criminal."²⁸⁸

The failure to recognize that determining positional predisposition is necessary in order to separate the "unwary innocent" from the "unwary criminal" has produced detrimental results. Had the Ninth Circuit applied Justice Posner's "positional" test in *United States v.*

283. See *Hollingsworth*, 27 F.3d at 1200.

284. See *supra* notes 51-71 and accompanying text.

285. *Sorrells v. United States*, 287 U.S. 435, 444-45 (1932) (quoting *Butts v. United States*, 273 F. 35, 38 (8th Cir. 1921)).

286. See, e.g., Elliot Rothstein, *United States v. Hollingsworth: The Entrapment Defense and the Neophyte Criminal—When the Commission of a Criminal Act Does Not Constitute a Crime*, 17 W. NEW ENG. L. REV. 303 (1995); Lori J. Rankin, Comment, *Entrapment: A Defense for the Willing, Yet Unready, Criminal?*, 63 U. CIN. L. REV. 1487 (1995).

287. Rothstein, *supra* note 286, at 330 (reaching the conclusion that the *Hollingsworth* decision creates a new independent element of readiness to the entrapment defense).

288. *Sherman v. United States*, 356 U.S. 369, 372 (1958).

Thickstun,²⁸⁹ it likely would not have concluded that Thickstun was predisposed to commit the crime. In fact, she was in the process of working with the government to reach a settlement when she was first approached by the agent. Regardless of whatever desire Thickstun may have had to eliminate her debt with a small bribe, she was not in a "position" to commit the crime before the government official approached her. She made no attempt to nefariously contact or cultivate a relationship with an IRS agent; to the contrary, she retained a lawyer through whom all communications and settlements offers were coordinated.²⁹⁰ The result in this case illustrates that the entrapment defense has seemingly failed to shield from prosecution those defendants who were not predisposed to commit the criminal act but committed the crime only because of government involvement.

While Justice Posner seems to articulate an appropriate test for determining predisposition, the positional predisposition test has been criticized because it is not applicable in all instances.²⁹¹ It does not apply to bribery cases in which a defendant attempts to bribe an IRS agent, for in those instances a defendant would never be in a position to bribe the IRS without government involvement.²⁹² The validity of this criticism is illustrated when applying Justice Posner's test to the *Thickstun* case. Courts could inquire as to whether Thickstun was in a "position" to commit the crime, but then courts could never say that she would be in a "position" to bribe the IRS without governmental assistance. The criminal act of bribing a public official inherently includes acts of a government official. In that sense, Justice Posner's assertion that a defendant is only "predisposed" if he is actually in a position to commit the crime without government assistance²⁹³ could not be applicable to the crime of bribing a public official. The "positional" approach to predisposition is not, as illustrated above, without merit. The Supreme Court, however, should not adopt this as the only test for predisposition because it would not be applicable in all instances.

289. 110 F.3d 1394.

290. See *supra* notes 239-40 and accompanying text.

291. See, e.g., *Thickstun*, 110 F.3d at 1398.

292. *Id.* ("Such a rule would be especially problematic in bribery cases. A person is never 'positionally' able to bribe a public official without cooperation from that official.").

293. *United States v. Hollingsworth*, 27 F.3d 1196, 1200 (7th Cir. 1994).

B. *The Ordinary Opportunity Test*

The test Justice Breyer articulated in *United States v. Gendron*²⁹⁴ added an important inquiry into how the defendant would have acted under ordinary circumstance. This inquiry, however, failed to find that *Jacobson* required a positional element in determining predisposition. Justice Breyer suggested that all *Jacobson* stands for is that the government may not, in its attempts to induce the target of a sting to commit a crime, confront him with circumstances that are different from the ordinary circumstances of a private inducement.²⁹⁵ Essentially, the court thought that the government's attempt to persuade Jacobson by enticing him with First Amendment rights, had departed from typicality. This analysis is questionable because the circumstances that Jacobson faced may not have departed from typicality. As the *Hollingsworth* court recognized, "[j]ust as the gun industry likes to wrap itself in the mantle of the Second Amendment, so the pornography industry likes to wrap itself in the mantle of the First Amendment."²⁹⁶ Nonetheless, persuasive political writings can often make a weak person, who is repeatedly told by society that his weaknesses are wrong and immoral, think that he is in fact normal and participating in what should be a lawful activity.

Justice Breyer does, however, offer an important consideration that should not be discounted when determining predisposition. His approach requires the government to show that a defendant would have committed the crime when "faced with an ordinary 'opportunity' to commit the crime rather than a special 'inducement.'"²⁹⁷ Such an approach would discourage the government from preying upon the needs and weaknesses of an otherwise innocent citizen by approaching him with "indecent proposals," to convince him to commit a criminal act so the government can then prosecute. If someone would not likely commit the crime under ordinary circumstances, but did so because of the extraordinary opportunities offered by government officials, he does not likely pose the sort of threat to society that the government seeks to stop.

An application of the ordinary opportunity test instead of the positional test will likely lead to the same result in many instances.²⁹⁸ In

294. 18 F.3d 955 (1st Cir. 1994).

295. *Id.* at 962.

296. *Hollingsworth*, 27 F.3d at 1199.

297. *Gendron*, 18 F.3d at 963.

298. *See, e.g., United States v. Knox*, 112 F.3d 802 (5th Cir. 1997) (noting that the result would remain the same under the *Gendron* approach, although the court relied on the *Hollingsworth* approach in reaching its conclusion).

fact, if the Ninth Circuit applied the ordinary opportunity test to the *Thickstun* case, it would likely conclude that the government failed to show predisposition. The government's evidence in *Thickstun* did not show how she would have acted had she been faced with an ordinary "opportunity" to commit the crime rather than a special inducement. In fact, *Thickstun*'s initial decision to retain a lawyer and engage in lawful settlement negotiations shows that when left to her own devices, she would never have run afoul of the law. Furthermore, *Thickstun* was offered complete discharge from a tax liability of a little less than half a million dollars for the price of \$5,000.²⁹⁹ This can hardly be deemed an ordinary opportunity. It would be better classified as an "indecent proposal" rather than an ordinary inducement.³⁰⁰ Applying the ordinary opportunity analysis to the *Thickstun* case would clearly lead to the conclusion that the government failed to prove that she was predisposed to commit the crime.

C. Proposal: Utilization of Both the "Positional Predisposition" and "Ordinary Circumstances" Approaches in Determining Predisposition

As both the majority and dissent in *Hollingsworth* acknowledge, *Jacobson* clearly stands for the proposition that predisposition goes beyond the mental state of the defendant.³⁰¹ The *Jacobson* Court held that predisposition must be established both before and independent of the government investigation.³⁰² As the *Jacobson* Court held, the entrapment defense should prevail when a "law-abiding citizen who, if left to his own devices, likely would have never run afoul of the law."³⁰³ This phrase, when read in conjunction with the court's holding that predisposition must be established before and independent of any government involvement, suggests that the Court is no longer amenable to a finding of a willingness to act, or an absence of reluctance on the part of the defendants, as determinative of predisposition.

As part of the evaluation of predisposition, courts should look at the defendant's background and inquire as to both whether the defendant was in a "position" to commit the crime and how the defendant would have acted in the most "ordinary of circumstances." The first part of the test requires the court to examine whether the defend-

299. *United States v. Thickstun*, 110 F.3d 1394, 1396 (9th Cir.), cert. denied, 118 S. Ct. 305 (1997).

300. See *supra* notes 187-88 and accompanying text.

301. *Jacobson v. United States*, 503 U.S. 540, 549 (1992); *Hollingsworth*, 27 F.3d at 1199.

302. Rothstein, *supra* note 286, at 331.

303. *Jacobson*, 503 U.S. at 553-54.

ant was in a "position" to commit the crime, omitting the requirement that he be in that position without government involvement. As seen in bribery of public official cases, some crimes could never theoretically be committed without government involvement.³⁰⁴ Instead, the courts should focus on whether the defendant was able and likely to commit the crime. A determination of whether the defendant was able to commit the crime should be based on the factors that Judge Posner articulated: his experience, training and contacts.³⁰⁵ A determination of whether he was likely to commit the crime would, in turn, focus on what type of activity the defendant was engaged in prior to government contact.

The second part of the test, identical to that articulated by Justice Breyer,³⁰⁶ would inquire whether the defendant would have reacted in the same manner when faced with an "ordinary opportunity" to commit that crime. As Justice Breyer pointed out, this determination is essential because it prevents the court from concluding that the defendant was predisposed to commit the crime simply from the fact that the defendant committed the crime.³⁰⁷ This inquiry would prevent the government from proving predisposition in instances where it does not have evidence that the person would have committed a crime under ordinary circumstances. In essence, it prohibits the government from proving predisposition with evidence of the defendant's response to indecent proposals. This inquiry is also critical in preventing government officials from continually preying upon the needs and weaknesses of otherwise law-abiding citizens and offering extraordinary opportunities in order to persuade them to commit crimes.

D. Impact

The many approaches to defining predisposition have left the doctrine of entrapment in a constant state of flux. The federal courts are currently split over how predisposition ought to be determined; however, the Supreme Court has stubbornly refused to mandate how predisposition ought to be determined.³⁰⁸ As illustrated in *Thickstun*, this could result in cases being decided on geography rather than legal analysis. Furthermore, no court has yet advanced an adequate approach that will accurately separate the "unwary innocent" from the

304. See *supra* notes 291-93 and accompanying text.

305. See *supra* note 219 and accompanying text.

306. See *supra* notes 178-93 and accompanying text.

307. *United States v. Gendron*, 18 F.3d 955, 963 (1st Cir. 1994).

308. See, e.g., *United States v. Thickstun*, 110 F.3d 1394 (9th Cir.), *cert. denied*, 118 S. Ct. 305 (1997).

"unwary criminal" in all instances. The hybrid approach proposed will protect that "otherwise law-abiding citizen" by examining whether the defendant was in a "position" to commit the crime and how the defendant would have acted in the most "ordinary of circumstances."

This approach avoids the weakness of the *Hollingsworth* approach because it will be applicable in all cases and also prohibits the government from enticing an individual by creating "extraordinary circumstances." Under this test, a claim of entrapment by a defendant like Thickett, who was not in a position to commit a crime prior to the inducement by the government official, would not be defeated on a finding that she was predisposed. Moreover, the government would be forbidden to prey upon the needs and weaknesses of an "otherwise law-abiding citizen" by offering him opportunities outside the most "ordinary of circumstances," thereby persuading him to commit a crime.

The adoption of such an approach could not rationally be said to lead to more crime,³⁰⁹ nor will it flood the courts with more litigation. This approach will not be burdensome for the law enforcement community.³¹⁰ By adopting it, the Supreme Court would end the confusion among the federal courts on how predisposition ought to be determined. The approach would comport with Supreme Court precedent that mandates protection of the "law-abiding citizen who, if left to his own devices, likely would have never run afoul of the law."³¹¹ This hybrid approach to determining entrapment would protect law abiding citizens by defeating an entrapment defense only when the defendant was predisposed to commit a crime in instances where a defendant was in a position to commit a crime, and where the government can show that he would have acted in a criminal manner under the most ordinary of circumstances. The Court's failure to do so has already resulted in inconsistencies in federal court decisions.

CONCLUSION

The entrapment defense was established as a safeguard to protect the otherwise law-abiding citizen. The federal courts, however, have

309. *But see* Rothstein, *supra* note 286, at 330 (arguing that "[i]t would seem that disorganized neophyte criminals would be immune from prosecution under the *Hollingsworth* analysis simply because they were not yet skilled practitioners of the criminal act").

310. *But see id.* at 330. This note argued that the *Hollingsworth* court allowed readiness to become an independent element of the entrapment defense. The author opines that such a requirement would be very burdensome on law enforcement.

311. *Jacobson v. United States*, 503 U.S. 540, 553-54 (1992).

been unable to agree on the critical element to defeat this defense: namely, how predisposition should be determined. The Supreme Court's decision in *Jacobson* makes it clear that predisposition must be evaluated prior to government involvement, but then it failed to clarify how predisposition should be determined.

An analysis of the facts in *Thickstun* reveals that the Ninth Circuit failed to protect Thickstun, an otherwise law-biding citizen, by finding her predisposed to commit the crime, without considering whether she was in a "position" to commit the crime or how she would have acted in the most "ordinary of circumstances." This application of the entrapment doctrine sent Thickstun to jail, even though she clearly lacked the criminal predisposition to commit the crime.³¹² The result illustrates the need for the Supreme Court to articulate a standardized approach to predisposition.

The fact finder, utilizing this approach, would be able to conduct an informed and fair inquiry into whether or not the defendant possessed predisposition prior to the government's intervention. This approach would not only successfully separate the "unwary innocent" from the "unwary criminal," it would also ensure that defendants like Thickstun receive justice. Under this approach, the criminal who would have participated in criminal activity without government intervention would find no protection from an entrapment defense. At the same time, this approach protects otherwise law-abiding citizens who would not have participated in the criminal act(s) if they had not encountered government officials.

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312. *But see Thickstun*, 110 F.3d at 1396-97 (holding that based on the evidence, a reasonable jury could conclude that Thickstun was predisposed to commit the crime because "[e]ach predisposition factor weighs against Thickstun").

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